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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF ARIZONA

10 United States of America,
11 Plaintiff,
12 v.
13 Christopher Matthew Clements
14 Defendants.

CR 08-0303-TUC-DCB(CRP)
GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO
SUPPRESS UNLAWFUL SEIZURE
AND MOTION TO SUPPRESS
STATEMENTS

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16 NOW COMES the United States of America, by its attorneys, DIANE J. HUMETEWA
17 United States Attorney for the District of Arizona and SHELLEY K.G. CLEMENS,
18 Assistant United States Attorney, and hereby submits its response to the Defendant's Motion
19 to Suppress Unlawful Seizure and Motion to Suppress Statements.

20 **I. FACTS**

21 On October 3, 2007, officers with the Tucson Police Department received a report from
22 a woman, who disclosed that she had been tortured and sexually assaulted. She further
23 disclosed that other females had been held captive, were tortured and then forced to perform
24 sexual acts with their captor and his associates. Based on her report, on October 5, 2007,
25 undercover officers began performing surveillance on a structure at 2640 S. Cottonwood
26 Lane, Tucson, AZ, where it was believed the suspect was residing.
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1 While there, undercover officers observed the defendant approach the structure, either
2 put something into or take something out of the trash, and then loiter in the area for a little
3 bit. The defendant was then observed getting into his vehicle and leaving the area.
4 Undercover officers followed him to the Circle K on 22nd and I-10. Not knowing at that
5 point what his identity was or his involvement with the suspected residence, the undercover
6 officers contacted a patrol officer to make contact with the defendant and determine his
7 identity.

8 Officer Chris Morin made contact with the defendant while he was still at the Circle K.
9 Contrary to the defendant's assertion in his Motions to Suppress, the defendant was not in
10 his car when officers made contact, nor was he removed from his car. The defendant was
11 inside the Circle K, when Officer Morin approached him and asked if he would mind
12 stepping outside and answering a few questions. The defendant voluntarily agreed to do so.
13 The defendant accompanied Officer Morin outside, where he spoke to Officer Morin, in the
14 presence of two undercover officers. He was not in custody, he was not handcuffed or
15 restrained in any fashion, and he was free to leave.

16 When asked his name, the defendant initially lied to the officer and told him his name
17 was "Donald Johnson." Officer Morin radioed dispatch regarding the name "Donald
18 Johnson." The name "Donald Johnson" came back with no returns found, which was highly
19 unusual. Believing the name to be false, the officer advised the defendant that lying to an
20 officer was illegal. The defendant then gave a second false name. A check of the second
21 name returned the same results. When confronted with the results, the defendant finally
22 advised the officer of his true and correct name. It was then determined that there was an
23 outstanding warrant for the defendant out of Oregon, but that it was non-extraditable. Upon
24 learning of the defendant's true identity, officers also determined that he was a convicted sex
25 offender who had a duty to register. The defendant was then taken into custody for giving

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1 false information to a police officer, and advised of his duty to register as a sex offender in
2 the State of Arizona.

3 The contact with the defendant took place in the parking lot of the Circle K. He was not
4 placed under arrest or restrained in any way until the end of the interview, after it was
5 determined that he had lied twice to officers, and there was probably cause for his arrest. At
6 no time did he ask to leave or attempt to leave.

7 8 **II. ARGUMENT AND AUTHORITY**

9 In his motion to suppress the unlawful seizure, the defendant claims that his arrest, as
10 well as any evidence derived the encounter with law enforcement, should be suppressed, as
11 he was unlawfully seized by law enforcement. In his motion to suppress statements, the
12 defendant further argues that any statements made by him during the police contact on
13 October 5, 2007, should be suppressed as they were the product of a custodial interrogation
14 and subject to *Miranda* restrictions.

15 First, the defendant's identity cannot be suppressed, regardless of the legality of the
16 encounter. Second, the contact with the defendant was a consensual, non-custodial encounter
17 to determine his identity and nexus to the structure they had under surveillance. And finally,
18 once the defendant provided false information to the officer, he committed a new offense in
19 the officer's presence which gave the officers has reasonable suspicion to detain him in order
20 to satisfy their suspicions, as well as probable cause to place him under arrest for a state
21 charge of giving false information to a law enforcement officer.

22 **A. THE DEFENDANT'S IDENTITY IS NOT SUPPRESSIBLE.**

23 The government seeks to introduce evidence of the defendant's identity, which is
24 relevant to show that he was present in the District of Arizona as early as October 5, 2007.
25 Even if this Court were to conclude that Officer Morin's contact with the defendant was
26 legally infirm, it is well-settled that "[a] defendant's identity need not be suppressed merely
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1 it is discovered as the result of an illegal arrest or search.” *United States v. Guzman-Bruno*,
2 27 F.3d 420, 421 (9th Cir. 1994) (The identity of a defendant in an illegal re-entry case need
3 not be suppressed where police, suspicious of defendant’s attire and the location he was
4 standing, approached him, patted him down, asked him where he was born, and interviewed
5 him in administrative proceedings without advising him of his *Miranda* rights.) To the
6 contrary, “there is no sanction to be applied when an illegal arrest leads only to discovery of
7 the man’s identity.” *Id.* In fact, “[t]he ‘body’ or identity of a defendant . . . is never itself
8 suppressible as a fruit of an unlawful arrest.” *Id.* at 422 (citing *INS v. Lopez-Mendoza*, 468
9 U.S. 1032, 1039, 104 S.Ct. 3479, 3483 (1984)). Therefore, “[a]n illegal arrest would not
10 serve to suppress [a defendant’s] identity since ‘there is no sanction to be applied when an
11 illegal arrest only leads to discovery of the man’s identity and that merely leads to the official
12 file or other independent evidence.’” *Id.* (Citation omitted.)

13 **B. THE STATEMENTS OF THE DEFENDANT ARE ADMISSIBLE AS PART**
14 **OF A CONSENSUAL, NON-CUSTODIAL, ENCOUNTER.**

15 The government also seeks to introduce evidence that the defendant provided two false
16 names, as well as finally admitting his correct identification, while speaking with the
17 officers.

18 1. THE DEFENDANT WAS NOT SEIZED FOR PURPOSES OF
A FOURTH AMENDMENT VIOLATION.

19 It is well established that the Fourth Amendment is not implicated when law enforcement
20 officers merely approach an individual in public and ask him if he is willing to answer
21 questions. *See Muehler v. Mena*, 544 U.S. 93, 101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005);
22 *see also Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United*
23 *States v. Mendoza-Cepeda*, 250 F.3d 626, 628 (8th Cir.2001). *See also Orhorhaghe v. INS*,
24 38 F.3d 488, 494 (9th Cir.1994). This is true whether an officer approaches a person who is
25 on foot or a person who is in a car parked in a public place. *See United States v. Kim*, 25 F.3d
26 1426, 1430 (9th Cir.1994). Moreover, it is clear that the permissible questions may include
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1 a request for consent to search, *see Muehler*, 544 U.S. at 101, 125 S.Ct. 1465, “as long as the
2 police do not convey a message that compliance with their requests is required.” *United*
3 *States v. Bostick*, 501 U.S. 429, 435, 111 S.Ct. 2382 (1991). Absent indicia of force or
4 aggression, a request for identification or information is not a seizure or investigatory stop.
5 *See United States v. \$25,000 U.S. Currency*, 853 F.2d 1501, 1505 (9th Cir.1988).

6 Officer Morin requested the defendant’s assistance in answering a few questions, and
7 asked him if he would step outside. The defendant agreed. He did not lay hands on the
8 defendant and remove him from the Circle K. The purpose of the inquiry was to establish
9 the defendant’s identity, and to determine if he knew anything about the residence in
10 question. As no time was the defendant restrained or advised he could not leave until he was
11 placed under arrest. As such, there was no Fourth Amendment seizure.

12 Officer Morin’s check of the defendant’s identity through dispatch was not a Fourth
13 Amendment seizure. *See United States v. Diaz-Castaneda*, 494 F.3d 1146, 1153 (9th Cir.
14 2007.) (Police officer’s check of passenger’s identification with radio dispatch during a
15 traffic stop was not a “search” or “seizure” under the Fourth Amendment). The fact that the
16 officer told him that he believed that the defendant had given a false name, and warned him
17 of the consequences of such action, did not turn the encounter from consensual to non-
18 consensual, where he did not threaten the defendant or compel him to stay.

19 Even if the court determines that the defendant was “seized” once Officer Morin
20 admonished him of the consequences to tell the truth, at that point, Officer Morin would have
21 been justified from that point forward in detaining the defendant as part of a valid
22 investigatory stop. At that point, the defendant had given the officer false information in the
23 form of a false name, which was a violation of law. The officer would have been justified
24 in detaining the defendant as part of a *Terry* stop to determine what the defendant’s true
25 identity was. *See United States v. \$25,000 U.S. Currency*, 853 F.2d at 1506-1507. From

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1 that point, the detention, if any, lasted no longer than necessary to effectuate the purpose of
2 the detention, which was to determine the defendant's identity.

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4 2. MIRANDA WARNINGS ARE NOT REQUIRED FOR A
5 NON-CUSTODIAL INTERVIEW.

6 The Defendant also argues that the court should suppress any statements made by the
7 defendant, which would include his admissions that he had provided the officers with a false
8 identity, as any statements "were taken without the prophylactic protections guaranteed in
9 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." (See defendant's
10 Motion to Suppress Statements - Page 3.) In order for the defendant to make out a claim
11 under *Miranda*, however, his statements must have been the product of custodial
12 interrogation. *Id.* at 444

13 Whether an individual is in custody for purposes of *Miranda* depends on the totality of
14 the circumstances at the time the defendant is interviewed. *United States v. Allen*, 699 F.2d
15 453, 458 (9th Cir. 1982). A trial court must determine if a reasonable person in the
16 defendant's position would conclude that he was not free to leave. *Id.* at 324; *United States*
17 *v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981). The following factors are among those
18 relevant in making that determination:

- 19 1) The language used by the officers in summoning the person interviewed;
 - 20 2) The physical characteristics of the place where the interrogation occurred;
 - 21 3) The degree of pressure applied to detain the individual;
 - 22 4) The duration of the detention; and
 - 23 5) The extent to which the person was confronted with evidence of his guilt.
- 24 *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001); *United States v. Wauneka*, 770
25 F.2d 1434, 1438 (9th Cir. 1985). Neither a police officer's subjective intent nor a defendant's
26 unusual susceptibilities are relevant to the inquiry. *Stansbury v. California*, 511 U.S. 318,
27 323,
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1 325 (1994). The ultimate question, however, is whether there was “a formal arrest or restraint
2 on freedom of movement of the degree associated with a formal arrest.” *Stansbury v.*
3 *California*, 511 U.S. at 325. In determining the custody status of an individual, courts should
4 consider if the individual “voluntarily approached or accompanied law officers
5 *understanding that questioning would ensue.*” *United States v. Kim*, 292 F.3d 969, 974 (9th
6 Cir. 2002) (emphasis in original) (Court found defendant had not willingly submitted to
7 police questioning by entering her own business while police were there executing search
8 warrant.)

9 A single officer’s initial contact with a person asking if he would step outside does not
10 rise to the level of causing a reasonable person to feel that he was in custody. The defendant
11 was aware that the purpose of going outside was to answer some questions. The interview
12 took place in the parking lot of a Circle K, in full view of the public. The questioning of the
13 defendant took approximately 15-20 minutes, and the only confrontation that took place was
14 when officers had cause to believe the defendant had lied about his name. Officer Morin’s
15 warning to the defendant that lying to an officer was against the law did not rise to the level
16 that a reasonable person would believe he was in custody. Simply because the defendant
17 subjectively may have thought that he would likely be arrested if he gave his true name is not
18 enough to show that he was “in custody” for purposes of *Miranda*. There was no formal
19 arrest nor was there an outward restraint on the defendant’s freedom to the same degree as
20 an arrest. He could have stopped the questioning at any time.

21 Since the defendant was not in custody for purposes of *Miranda* at the time of his
22 admission that he had provided the officers with a false identity, his admission is not subject
23 to suppression. Therefore, his motion to suppress statements should be denied.

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1 **III. THE DEFENDANT COMMITTED A NEW AND DISTINCT CRIME IN THE**
2 **PRESENCE OF THE OFFICERS, WHICH IS AN EXCEPTION TO**
3 **EXCLUSIONARY RULE.**

4 Even if the initial contact with the Defendant is deemed to be an illegal seizure,
5 Defendant's subsequent illegal act of giving the officer false information triggers an
6 exception to the exclusionary rule of the "fruit of the poisonous tree" doctrine. "If a
7 suspect's response to an illegal stop 'is itself a new, distinct crime, then the police
8 constitutionally may arrest the [suspect] for that crime.'"; *United States v. Sprinkle*, 106 F.3d
9 613 (4th Cir.1997) *citing* *United States v. Bailey*, 691 F.2d 1009, 1017 (11th Cir. 1982).

10 There is a strong policy reason for holding that a new and distinct crime, even if
11 triggered by an illegal stop, is a sufficient intervening event to provide independent
12 grounds for arrest. As the *Bailey* court recognized, "[a] contrary rule would
13 virtually immunize a defendant from prosecution for all crimes he might commit
14 that have a sufficient causal connection to the police misconduct." *Id.* Because the
15 arrest for the new, distinct crime is lawful, evidence seized in a search incident to
16 that lawful arrest is admissible. *Id.* at 1018.

17 *Sprinkle*, at 619. In *Bailey*, *supra*, the Eleventh Circuit held that even assuming the first
18 arrest was illegal, the second arrest was legal because the defendant, when caught after
19 fleeing, struck the DEA agent with his fists and tried to grab the agent's gun during the
20 ensuing struggle. *Bailey*, 691 F.2d at 1018-19; *See also*, *United States v. King*, 724 F.2d 253,
21 256 (1st Cir. 1984)(assuming attempted search of passenger was illegal, driver's "shooting
22 [at police] was an independent intervening act which purged the taint of the prior illegality.")

23 During the interview with the defendant, he twice gave officers false information in
24 violation of A.R.S. § 13-2907.01, presumably in order to avoid arrest for an out-standing
25 warrant from Oregon. By giving officers that false information, he committed a new offense
26 that provided officers probable cause to arrest him. The arrest for this new crime was legal,
27 and not the fruit of any possible poisonous tree. As such, the circumstances surrounding his
28 arrest and his identity would not be suppressible. *United States v. Washington*, 490 F.3d 765
(9th Cir.2007) (evidence resulting from an illegal seizure will normally be suppressed, unless
there was an intervening act that purges the taint of the fruit of the poisonous tree.)

1 **IV. CONCLUSION**

2 WHEREFORE, PREMISES CONSIDERED, the government respectfully requests that
3 this court deny both the defendant's Motion to Suppress Unlawful Seizure and Motion to
4 Suppress Statements. The defendant's identity cannot be suppressed regardless of the
5 legality of the contact with officers. In addition, there was not an unlawful seizure of the
6 defendant as the contact with the defendant was consensual. His statements were made
7 voluntarily and were the product of a non-custodial interview. Finally, his intervening act
8 of committing a new offense while in the presence of the officers purges any taint from
9 evidence discovered as a result of that new offense.

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11 Respectfully submitted,

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18 Copy of the foregoing served electronically
19 or by other means this 14th day of April, 2008, to:

20 John Kaufmann, Esq.
21 Attorney for the defendant
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